

CHONG LEE FAH

a

v.

THE NEW STRAITS TIMES PRESS (M) BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR

b

RAUS SHARIF J

[JUDICIAL REVIEW APPLICATION NO: R1-25-71-03]

18 OCTOBER 2005

ADMINISTRATIVE LAW: Remedies - Certiorari, application for - To quash award of Industrial Court - Whether applicant entitled to consider herself constructively dismissed - Whether first respondent had breached a fundamental term of contract of employment - Whether Industrial Court had erred

c

LABOUR LAW: Employment - Transfer - Breach - Constructive dismissal - Whether first respondent had breached a fundamental term of contract of employment - Whether applicant entitled to consider herself constructively dismissed

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This was an application for *certiorari* to quash the Industrial Court's decision dismissing the applicant's claim for constructive dismissal. The applicant had pleaded constructive dismissal on the ground that the first respondent had no right in law to transfer her to a subsidiary, Amal Assurance Berhad ('AMAL'), on terms and conditions less favourable and which amounted to a fundamental breach of her contract of employment with the first respondent. The main issue that arose was whether the first respondent had breached a fundamental term of the contract of employment with the applicant when it made the decision to transfer the applicant.

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Held (allowing the application):

[1] The Industrial Court had concluded that the transfer of the applicant to AMAL "was merely a transfer within the group." This court was unable to agree in the light of the evidence adduced. If it was indeed a transfer, as contended by the first respondent, there would be no need for a fresh letter of employment and the applicant would not have had to sign a new contract with new terms and conditions. (p 609 e-f)

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- a** [2] A cursory comparison of the basic terms such as the salary, retirement benefits, medical benefits, hospitalisation, working hours and annual leave would clearly indicate that the terms that the applicant was enjoying at the material time with the first respondent was far superior to that given by AMAL. The drastic change amounted to a fundamental breach of contract on the part of the first respondent and the applicant was right to have considered herself constructively dismissed. The Industrial Court had erred and its award, when viewed objectively, was absurd and devoid of plausible justification such that no reasonable person would have reached the same conclusion.
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- c** **Case(s) referred to:**
Ladang Holyrood v. Ayasamy Manikam & Ors [2004] 2 CLJ 697 CA (*refd*)
Wong Chee Hong v. Cathay Organization [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298 SC (*refd*)
- d** **Legislation referred to:**
Industrial Relation Act 1967, s. 13

For the applicant - Sumita Gnanarajah; M/s Sumita & Assoc
For the respondents - Rajeswari Karupiah (Jacinta Johnson); M/s Zul Rafique & Partners
- e** *Reported by Suhainah Wahiduddin*

JUDGMENT

Raus Sharif J:

- f** **Application**
This is an application by the applicant for an order of *certiorari* to quash the Industrial Court Award No. 240 of 2003 handed down on 24 March 2003. In the award, the applicant's claim for constructive dismissal was dismissed by the Industrial Court.
- g** **Facts**
The relevant facts leading to this application are these. The applicant commenced employment with The New Straits Times Press (M) Bhd (the first respondent) on 1 September 1977 as an Assistant to the Group Secretary *vide* a letter dated 22 July 1977. She was subsequently transferred to the position of Registrar of the Share Registration Section (SRS) with effect from 1 April 1994.
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In November 1997, the applicant was informed by the first respondent that as a result of the closure of the SRS she would be transferred to a subsidiary known as Amal Assurance Berhad (AMAL). The applicant proposed a secondment instead of a transfer but this was rejected as it was contended by the first respondent that the policy at that time was to transfer and not to second employee. *a*

On 8 January 1998, the applicant was informed by the first respondent that the transfer would take effect on 15 January 1998 and that her service with AMAL would be regarded as being continuous, without deprivation of any benefits that the applicant enjoyed with the first respondent. *b*

By a letter dated 9 January 1998, the applicant sought further clarification on the terms and conditions of her redeployment to AMAL. *c*

AMAL, by a letter dated 13 January 1998 assured her of the continuity of service. However, on the following day, the applicant by way of a letter informed the first respondent that she was unable to accept the offer of employment from AMAL because the terms of employment with AMAL were unfavorable. In the same letter, the applicant also sought clarification on the following terms and services which the applicant was entitled at the material time: *d*

- (i) continuity of service; *e*
- (ii) retirement benefits;
- (iii) medical benefits; and
- (iv) other benefits. *f*

The first respondent did not reply. Instead reference was made to the previous letters and requested that the applicant to report for duty on 3 February 1998. She was also asked to utilize all outstanding leave with the first respondent. *g*

On 3 February 1998, the applicant pleaded constructive dismissal on the ground that the first respondent had no right in law to transfer her to the subsidiary and that she was being transferred on terms and conditions less favorable which amounted to a fundamental breach of her contract of employment with the first respondent. *h*

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- a* The Industrial Court rejected the applicant's claim for constructive dismissal. Hence, this application for judicial review by the applicant.

Issues

- b* The main issue before this court is whether the first respondent had breached a fundamental term of the contract of employment with the applicant when it made the decision to transfer the applicant to its subsidiary company, AMAL.

Findings

- c* Essentially the applicant's contention is that the first respondent had no right to transfer her to AMAL and that she was being transferred on terms and conditions less favorable which amounted to a fundamental breach of her contract with the first respondent.

- d* The first respondent contended otherwise. It was the contention of the first respondent that it has the right to transfer the applicant to any associate or subsidiary companies within the first respondent group of companies. Reference was made to the applicant's letter of appointment dated 27 July 1997 which expressly provides as follows:

- e* You will be required to work, as you may be directed from time to time, in any of the departments, offices, stores, factories or other places of work in Peninsular Malaysia of this Company or of any associated or subsidiary companies of this Company on such duties as may be allocated to you and your services may be transferred from time to time to or from any of these companies ...

- f* It was pointed by the first respondent that, at the time of the applicant's transfer, AMAL was not only a subsidiary of the first respondent, but the first respondent was one of AMAL's shareholders and AMAL was within the first respondent group of companies. Hence, AMAL came under the definition of an "associate companies" as stated in the applicant's letter of appointment, giving the first respondent's right to transfer the applicant to AMAL.

- g* It is an acceptable principle that the right to transfer an employee from one department to another and from one post of an establishment to another or from one branch to another or from one company to another within the organization is the prerogative of the management. In fact this right of transfer is embodied in the Industrial Relation Act 1967, where s. 13 provides that a company has the right to transfer its employees within the organization so long as such transfer does not entail a change to the detrimental of an employee in regard to the terms of employment.
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Clearly, the right to transfer is not without restriction. In *Ladang Holyrood v. Ayasamy a/l Manikam & 16 Ors* [2004] 2 CLJ 697, Arifin Zakaria, JCA (now Federal Court Judge) endorsed the right of the company to transfer its employees from one company to another within its organization but subject to well recognized restrictions as set out in *Ghaiye's Misconduct in Employment* which are as follows:

- (i) there is nothing to the contrary in the terms of employment;
- (ii) the management has acted *bona fide* and in the interest of its business;
- (iii) the management is not actuated by any indirect motive or any kind of *mala fide*;
- (iv) the transfer is not made for the purpose of harassing and victimizing the workmen; and
- (v) the transfer does not involve a change in the conditions of service.

His lordship further went on to state that whether a transfer entails a change to the detriment of an employee in regard to the terms of employment; or whether the transfer was *bona fide* is a question of fact for the court to determine.

The Industrial Court concluded at p. 10 of the award that the transfer of the applicant to AMAL “was merely a transfer within the group”. With respect I am unable to agree in light of the evidence adduced before the Industrial Court. To me, if it was indeed a transfer as contended by the first respondent there would be no need for a fresh letter of employment. If it was indeed a transfer one does not need to utilize one outstanding leave. Further, if it was indeed a transfer, one does not sign a new contract with new terms and conditions.

The doctrine of constructive dismissal has been expounded in the case of *Wong Chee Hong v. Cathay Organization* [1988] 1 CLJ 45; [1988] 1 CLJ (Rep) 298 where it was held:

The common law has always recognized the right of an employee to terminate his contract of service and therefore to consider himself as discharged from further obligation if the employer is guilty of such breach as affect the foundation of the contract ...

Thus, in order to determine whether the first respondent is guilty of any breach that affect the foundation of the contract, it is necessary to compare the applicant's terms and conditions of service in the two organizations which are as follows:

<i>a</i>	ITEMS	AMAL	NSTP
	Salary	RM6,730 pm x 12 months	RM7,292 pm x 12 months
	Retirement Benefits	0.5 x last drawn salary x years of service with AMAL	7% of monthly basic salary
<i>b</i>	Medical Benefits		
	a) General out-patient treatment	Panel doctors – up to a maximum of RM200 per annum (staff only)	Panel doctors – no limitation on number of visits (staff only)
<i>c</i>	b) Specialist treatment	Panel doctors recommendation up to a maximum of RM200 p.a. (staff only)	Panel doctors recommendation; no limitation (staff only)
	c) Dental treatment	Not provided	Panel dentists – no limitation on number of visits (staff only)
<i>d</i>	Hospitalization		
	AMAL	(RM)	NSTP (RM)
<i>e</i>	Hospital Room & Board (daily max. up to days)	20	Daily Room & Board (max. 60 days) 150
<i>f</i>	Miscellaneous Service (max. per disability)	2000	Intensive Care Unit (max. 45 days) 200
	Surgical Fees (max. per disability)	3500	Hospital Supplies and Service 2000
<i>g</i>	Anesthetic Fees (max. per disability)	30% of surgical fees reimbursement	Operating Theatre 875
	In-Hospital Doctor's Visits (daily max. up to days)	55	Pre-Surgical Diagnostic Service 350
<i>h</i>	Pre-Hospital Diagnosis Services (max. per disability within 12 months prior to hospitalization)	250	Anesthetist's Fees 1050
<i>i</i>			Basic Surgical Benefit 3500

Pre-Hospital Specialist Consultation (max. per disability within 12 months prior to hospitalization)	250	Major Surgical Bonus	10500	<i>a</i>
Ambulance Fees (max. per disability)	100	Daily In-Hospitalization Diagnostic Service	350	
Post-Hospital Treatment (max. per disability up to 31 days following discharge from hospital)	200	Post-Hospitalization Treatment	200	<i>b</i>
Out-Patient Accidental Treatment (max. per disability within 24 hours after the accident)	2000	Emergency Out-Patient Treatment (accident)	2000	<i>c</i>
		Ambulance Fees	150	

	AMAL	NSTP	<i>d</i>
Working Hours	8.30am – 5.15pm (Mon - Fri) 1.00pm – 1.45pm (Lunch) Total: 40 hours per week	9.00am – 5.00pm (Mon - Fri) 9.00am – 1.00pm (Saturday) 1.00pm – 2.00pm (Lunch) Total: 39 hours per week	<i>e</i>
Annual Leave	21 working days per annum (as per offer letter dated 5-1-98)	28 working days per annum	

A cursory comparison of the basic terms such as salary, retirement benefits, medical benefits, hospitalisation, working hours and annual leave, as seen from the above, clearly indicate that the terms that the applicant was enjoying at the material time with the first respondent was far more superior than given by AMAL. To me, the drastic change amounted to a fundamental breach of contract on the part of the first respondent and the applicant was right to consider herself constructively dismissed. *f*

Another point that the Industrial Court failed to consider was that the transfer was necessitated by the closure of the SRS. Had the applicant continued to remain in the employment of the first respondent, the first respondent would have been left with no choice but to retrench her from the service. Then, termination benefits would be payable to the applicant who had served 20-21 years of service with the first respondent. This was not done. Reasonable inference can be drawn from the conduct of the first respondent that the transfer of applicant to AMAL was an attempt to avoid paying the applicant, termination benefits following the closure of SRS. *g*

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a **Conclusion**

In conclusion, I am of the view that the award of the Industrial Court, when viewed objectively is absurd and devoid of plausible justification that no reasonable person would have reached the same conclusion. To me, there has been serious errors committed by the Industrial Court. Accordingly, I have no alternative but to allow the applicant's application with costs and the case be remitted to the Industrial Court.

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